NO. 86-58

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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.

Petitioner

VERSUS

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.

Respondents

REPLY BRIEF OF FRED S. JAMES & CO. OF TEXAS, INC. TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES G. BURKE, JR.
20th Floor, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2000
Telephone: (504) 569-2900
and
BURKE & MAYER, Of Counsel

16 pp

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The parties having an interest in the outcome of this case remain the same as outlined in the original Petition filed by FRED S. JAMES & CO. OF TEXAS, INC.

JAMES G. BURKE, JR.
20th Floor, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2000
Telephone: 504/569-2900
and
BURKE & MAYER, Of Counsel

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279 U.S. 564, 49 S.Ct. 420,
73 L.Ed. 846 (1929) 5,6,8

STATEMENT OF THE CASE

RESPONSE TO THE FACTUAL ALLEGATIONS OF RESPONDENTS

The assertion by Respondents[1] that the trial court specifically found and concluded that Dunnamis Offshore Towing, Inc. was not the agent of Equilease is not to be found in the transcript of the colloquy of the trial judge, is not to be found in the written Findings of Fact and Conclusions of Law, is not to be found in the Judgment and, is not to be found anywhere else. What the trial court actually found was that James Denning, who was formerly employed by Equilease in various functions including the construction of the Vessels, was not the agent of Equilease at the time he informed Fred S. James & Co. of Texas, Inc. ("James") that the insurance premiums would be paid by Equilease. This finding had no reference whatsoever to the validity of the charter parties, which the trial court, having found

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1. Respondents' Brief, page 10.

that James was entitled to full recovery under the state created lien, never addressed.

In its Second Opinion, the Fifth Circuit transformed the identity of the individual, Denning, into the corporate entity of Dunnamis Offshore Towing, Inc., and related the transformation to the validity of the charter parties as a finding of fact by the trial court.[2] This lack of agency of the guarantor of payment has absolutely no relationship to the legal requirement that to be valid, a bareboat charter party must be a complete surrender of management, custody and control of the vessel by the owner to the charterer.

As to the assertion on page 10 of Respondents' brief that "James admitted at trial and in brief that it did not rely on the credit of the vessel", the transcript of testimony, the record and the memoranda belie such an assertion. Never has James

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2. 756 F.2d 357, 363 (5th Cir. 1985).

stated orally or in writing that it did not rely on the credit of the Vessels.

Respondents suggest to the Court that James' reliance upon Dunnamis, Equilease and Eltra for payment is an admission that James did not rely on the credit of the vessel in the event of default of payment. A lienor may relay on the credit of others while at the same time relying on the credit of a vessel. As to reliance on the credit of the Vessels, besides the filing of the liens under the Louisiana Civil Code, the institution of in rem proceedings against the Vessels, the intervention in the foreclosure proceedings by Equilease, and the filing of liens under the Federal Maritime Lien Act, the transcript of trial clearly indicates that James relied upon the earnings of the Vessels when supposedly

placed under profitable charters in Mexican waters.[3] A finding that James relied upon the earnings of the Vessels for payment of the premiums, a clear indication upon the reliance of the credit of the Vessels[4], is totally inconsistent with a finding that James did not rely on the credit of the Vessels.

As to the charter parties, it is interesting to note that Respondents' only argument as to the validity of the charter parties is to take the issue of agency of the individual, Denning, transfer the individual into a separate and distinct corporate entity, take the non-existent finding out of context, and contend that such a finding is dispositive of the complete surrender and control of the Vessels. There

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3. The Fifth Circuit in its Second Opinion, adopted this finding of fact by the trial court and specifically found that, "Relying on this information, James decided to provide insurance for the three Vessels for another year rather than cancelling the policy and bringing suit for the unpaid premium". Appendix A48.

4. See, Fielder v. Bay Const. Co., 5 F.2d 227 (5th Cir.1925); Contra, Barnes v. The Kongo, 174 F.2d 67 (6th Cir. 1949).

is not one case that can be cited by Respondents where a demise or bareboat charter party containing just one of the factors of control exercised by Equilease has been held valid where two or more of the eight factors of control exist. The absence of a response is evidence of an inability to respond and an admission that the charter parties, like the preferred ship mortgages, do not meet the criteria established by this Court.[5]

SUMMARY OF THE ARGUMENT

A person seeking to show that a lienor has waived his lien has the burden of proof that the lienor has affirmatively waived this valuable privilege.

ARGUMENT

Respondents cite the decision of this Court in Marshall & Company v. The PRESIDENT ARTHUR[6] for the proposition that "If the evidence shows that

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5. Guzman v. Pichirilo, 369 U.S. 698, 699-701, 82 S.Ct. 1095, 1096, 8 L.Ed.2d 205 (1962).

6. 279 U.S. 564, 49 S.Ct. 420, 73 L.Ed. 846 (1929).

the owner and not the vessel was relied on for credit, a maritime lien does not attach."[7] Such interpretation neither corresponds to the opinion by this Court nor to its progeny. In PRESIDENT ARTHUR, this Court clearly stated that there must be affirmative action on the part of the lienor to express a clear and unequivocable intent of waiver stating:

> "...by taking other and different security, upon which it (the lienor) relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had."[8]

The various circuits have understood and interpreted the language of PRESIDENT ARTHUR as follows:

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7. Respondent's Brief, page 13.

8. Supra.

First Circuit:

> It is not enough, however, to show that the supplier relied in part on the credit of the owner's agent or the owner. The party entitled to the lien must have taken "affirmative action that manifests a clear intention to forego the lien".[9]

Second Circuit:

> The taking of a security for performance of the owner's personal obligation should not be construed as evidencing an intention to relinquish the existing lien on the vessel unless such an intention clearly appears.[10]

Fourth Circuit:

> The record is devoid of any indication that the claimants waived or intended to waive their right to liens therefore on the boat as permitted by the statute and hence it is immaterial, in considering their right to a lien for necessaries under the statute, that the supplies were ordered by the owner and that the sellers relied upon the credit of both the owner and the ship.[11]

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9. Farrell Ocean Services, Inc. v. U.S., 681 F.2d 91, 93 (1st Cir. 1982).

10. In Re: Marine Transit Corp., 94 F.2d 7 (2nd Cir. 1938).

11. Jeffrey v. Henderson Bros., 193 F.2d 589, 593 (4th Cir. 1951).

Ninth Circuit:

> Whether Farwest (the "Lienor") placed any reliance on the Barge is a question of fact. We must remand to resolve that factual issue ... . If the district court finds that Far West placed some reliance on the barge, under the statutory presumption in favor of materialmen under the Lien Act,... Farwest is entitled to a federal lien.[12]

As the opinions show, a finding or conclusion that a lienor has waived his lien and relied exclusively on the owner for payment will be sustained only in a case similar to PRESIDENT ARTHUR[13] where the lienor accepts an alternative form of security that is exclusive of the federal maritime lien. James neither accepted an alternate form of security, in any way, nor affirmatively waived its lien.

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12. Farwest Steel Corp. v. Barge SEA-SPAN 241, 769 F.2d 620, 624 (9th Cir. 1985).

13. Supra.

CONCLUSION

The fact that the Fifth Circuit has rendered three separate and conflicting opinions, (the En Banc requiring two amendments to conform to the record), demonstrates the fallibility of an appellate court in fashioning findings of fact from a complex record containing multiple legal issues.[14] The dissent by three judges as to the factual findings by the majority is a clear indication that the En Banc decision violated the mandate of Icicle Seafoods, Inc. v. Northington.[15] The conundrum resulting from the inconsistent and unsupported de novo findings of fact by the appellate court aptly justifies the necessity for certiorari to set forth the legal criteria to justify

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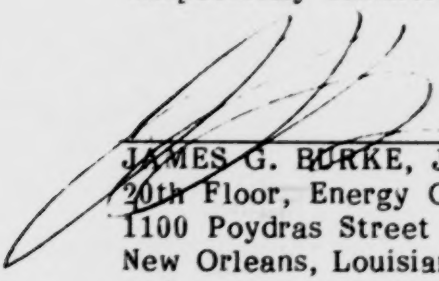
14. At trial, James had asserted four separate and distinct causes of action, any one of which would have permitted full recovery. The trial court, apparently exercising judicial economy, decided in favor of James on the state-created lien and left unresolved the remaining issues relating to the validity of the bareboat charter and unjust enrichment.

15. ____ U.S. ____, 106 S.Ct. 1527, 1530, 88 L.Ed.2d 224, 332 (1986).

waiver and the legal prerequisite for a valid demise or bareboat charter.

Respectfully submitted,



JAMES G. BURKE, JR.
20th Floor, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2000
and
BURKE & MAYER, Of Counsel
Telephone: 504/569-2900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above Reply Brief were served upon:

PHILIP A. FRANCO, ESQ.
Adams & Reese
4500 One Shell Square
New Orleans, Louisiana 70139

counsel for the respondent, first class postage prepaid, this 7th day of November, 1986.

JAMES G. BURKE, JR.
Attorney for Petitioner